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MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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**No. 77-828**

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FRANK A. GUNTHER, HERMAN EIG AND  
SIDNEY J. BROWN  
(Successors to Sheldon E. Bernstein, Leonard S.  
Melrod and Herman Eig), Partners d/b/a Savage  
Joint Venture, *Petitioners*

v.

MARYLAND-NATIONAL CAPITAL PARK AND  
PLANNING COMMISSION

---

On Petition for a Writ of Certiorari to the  
Court of Special Appeals of Maryland

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**REPLY BRIEF FOR PETITIONERS**

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The brief in opposition studiously ignores the fact that this case comes to this Court on a record consisting only of petitioners' complaint, as well as the fact that the decisions below were premised on the proposition that absent a statutory default by respondent "plaintiffs have no case, whatever the reasons for [respondent's] inordinate delay" (Pet. App. 6a). Thus, respondent's argument that the allegation of purposeful administrative delay "was *never* supported by the record" and its self-serving portrayal of "what

really happened" (Opp. p. 3) are irrelevant. The issue here is whether the allegations of the complaint state a claim of denial of due process, not whether petitioners would prevail if those allegations were put in issue, as they would be only upon a remand for further proceedings.<sup>1</sup>

As the petition points out, the due process issue was squarely raised in the trial court (Pet. p. 10; Pet. App. 16a ¶22). Petitioners' brief in the Special Court of Appeals argued that they "have been effectively denied due process by the defendant-appellee, MNCPCC \* \* \*" (Brief of Appellants p. 21), and more particularly that

"[T]he summary disposition of the case without ever according the parties an opportunity to a

<sup>1</sup> Respondents directly contradict the allegations upon which the present issue was decided when they contend that "petitioners never sought \* \* \* to get its preliminary subdivision plan before the Planning Board for a decision on its merits \* \* \*" (Opp. p. 3) and that administrative delay "never occurred" (Opp. p. 6). The petition for a writ of mandamus and other relief filed in the trial court (Pet. App. 11a-17a) explicitly alleged, *inter alia*, that petitioners made a further submission in support of their preliminary plan in July 1974 (¶4), that prior to December 1974 there were "efforts on the part of Petitioners through their engineer to have their preliminary plan processed" (¶8) and that thereafter there were "several unsuccessful requests by the Plaintiffs to have the Defendant's staff proceed with review procedures \* \* \*" (¶10). Indeed, respondent's version of "what really happened" (Opp. pp. 4-5) is internally inconsistent. If it is acknowledged that petitioners wrote a letter on December 2 "requesting Planning Board approval of the preliminary plan," how could respondent's staff "understand" on December 12 that "the applicant did not wish to pursue processing"? And if that was respondent's understanding, why did respondent ultimately take action on the preliminary plan on May 1, 1975? Petitioners seek only an opportunity to prove their allegation of purposeful administrative frustration of their applications—an allegation which must be assumed true for present purposes.

trial on the merits, especially when viewed in light of the loss of vested property rights by the petitioners (given them under the savings provisions of the Rural Zone) through the Board's prolonged inaction and the lower court's decision, amounts to a denial of due process guarantees as provided by Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution." *Id.* p. 13.

Petitioners' Petition for a Writ of Certiorari to the Maryland Court of Appeals explicitly referred to the Fourteenth Amendment (at p. 2) and raised the following question (at p. 3):

"IV. Does the prolonged inaction of Respondent, resulting in abridgment of significant vested property rights, amount to a denial of due process?"

Under these circumstances, respondents cannot properly argue that this is merely a "case of local statutory construction" (Opp. p. 7) and cannot avoid the serious due process question raised by the petition.

For the foregoing reasons and those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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